

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARY, UPMC
PRESBYTERIAN SHADYSIDE, SINGLE
EMPLOYER, d/b/a UPMC
PRESBYTERIAN HOSPITAL AND d/b/a
UPMC SHADYSIDE HOSPITAL

and

SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC

Cases: 06-CA-102465
06-CA-102494
06-CA-102516
06-CA-102518
06-CA-102525
06-CA-102534
06-CA-102540
06-CA-102542
06-CA-102544
06-CA-102555
06-CA-102559
06-CA-102566
06-CA-104090
06-CA-104104
06-CA-106636
06-CA-107127
06-CA-107431
06-CA-107532
06-CA-107896
06-CA-108547
06-CA-111578
06-CA-115826

**UPMC PRESBYTERIAN SHADYSIDE’S OPPOSITION TO COUNSEL FOR THE
GENERAL COUNSEL’S MOTION TO STRIKE CERTAIN OF RESPONDENT’S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARK CARISSIMI’S DECISION**

Respondent UPMC Presbyterian Shadyside (“Presbyterian Shadyside”) respectfully submits this Opposition to Counsel for the General Counsel’s Motion to Strike Certain of Respondent UPMC Presbyterian Shadyside’s Exceptions to Administrative Law Judge Mark Carissimi’s Decision (“Motion to Strike”). Because Presbyterian Shadyside’s Exceptions substantially conform to the Board’s Rules and Regulations, there is no basis for striking any of them, and the General Counsel’s Motion to Strike should be denied entirely.

BACKGROUND

Counsel for the General Counsel issued the Consolidated Complaint in this matter on September 30, 2013. A hearing was held in February, March, and April 2014. Prior to and throughout the hearing, Administrative Law Judge Mark Carissimi (“ALJ Carissimi”) made various rulings, including rulings on petitions to revoke subpoenas and other evidentiary issues. Some of these rulings were memorialized in orders while others were issued from the bench and reflected only in the hearing transcript. Following the hearing and post-trial briefing, ALJ Carissimi issued a written Decision dated November 14, 2014 (the “ALJD”). Presbyterian Shadyside, Counsel for the General Counsel (the “General Counsel”), and the Charging Party each filed exceptions on January 9, 2015. Presbyterian Shadyside filed 298 exceptions, while the General Counsel and Charging Party filed 8 and 10 exceptions, respectively.

Each of Presbyterian Shadyside’s exceptions clearly puts in issue some “part of the [ALJ’s] decision or [] other part of the record or proceedings,”¹ states the basis for the challenge, and includes citations, where appropriate, to an order, the ALJD, the hearing transcript, and/or hearing exhibits. Also, recognizing the expansive scope of the General Counsel’s Consolidated Complaint – which resulted in a correspondingly large volume of record evidence, numerous rulings, and a lengthy ALJD – Presbyterian Shadyside organized its exceptions under descriptive headings to guide the reader. Finally, Presbyterian Shadyside submitted a brief in support of its exceptions, further explaining the legal and factual bases for its exceptions and citing applicable legal authority and record evidence in support.

¹ Board Rules and Regulations Sec. 102.46(a).

DISCUSSION

The General Counsel contends that certain of Presbyterian Shadyside's exceptions do not satisfy the Board's Rules and Regulations and moves to strike them. For the reasons discussed below, the General Counsel's Motion to Strike has no merit and should be denied in its entirety.

The Board's Rules and Regulations state that each exception:

- (i) shall set forth specifically the questions of procedure, fact, law or policy to which exception is taken;
- (ii) shall identify that part of the administrative law judge's decision to which objection is made;
- (iii) shall designate by precise citation of page the portions of the record relied on; and
- (iv) shall concisely state the grounds for the exception.

102.46(b)(1). Although exceptions which fail to comply with the foregoing requirements "may be disregarded" (Sec. 102.46(b)(2)), the Board does not strike exceptions for technical deficiencies and looks, instead, for "substantial compliance" with these requirements. *See, e.g., Carey Salt Co.*, 360 NLRB No. 38, n.2 (2014) (declining to strike exceptions that "are in substantial compliance with the requirements"); *Monarch Machine*, 227 NLRB 1265, n.2 (1977) (denying motion to strike exceptions that were "not in precise conformity" with 102.46(b) because they were "in substantial compliance"); *Gliddings & Lewis, Inc.*, 240 NLRB 441, n.2 (1979) (same).

The General Counsel complains that certain of Presbyterian Shadyside's exceptions do not contain a citation to the ALJD (Motion ¶ 6) and that others do not contain a citation to the record (Motion ¶ 7). Neither argument provides a basis for striking any of Presbyterian Shadyside's exceptions here. All of Presbyterian Shadyside's exceptions substantially comply with the Board's Rules and Regulations. Each exception clearly states the issue and the grounds

for the exception, and cites in detail the ALJD and/or the evidentiary record, to the extent applicable to the exception. Indeed, the vast majority of Presbyterian Shadyside's exceptions include citations to both the ALJD and to the record. There are practical and, in most cases, self-evident reasons that certain of Presbyterian Shadyside's exceptions do not contain both an ALJD cite and a record cite. To the extent the General Counsel professes to have difficulty discerning or comprehending the bases for certain of Presbyterian Shadyside's exceptions, such difficulty cannot be attributed to the manner in which Presbyterian Shadyside has presented them. The General Counsel's Motion to Strike should be denied.

I. Presbyterian Shadyside Has Not Cited the ALJD Where the Exception is to a Finding, Ruling, or Other Issue not Contained in the ALJD.

In some instances, Presbyterian Shadyside takes exception to a finding or ruling of the ALJ that is not contained in the ALJD.² For such exceptions, Presbyterian Shadyside did not cite the ALJD because there is nothing in the ALJD to cite.³ In other instances, Presbyterian Shadyside takes exception to the very fact that the ALJ *failed to include* something in the ALJD. Again, for such exceptions, Presbyterian Shadyside did not cite the ALJD because there is nothing in the ALJD to cite – indeed, that is the very point of such exceptions.⁴ Accordingly, to

² In fact, the Board's Rules and Regulations provide that any party may file exceptions, not just to the administrative law judge's decision, but also "to any other part of the record or proceedings (including rulings upon all motions or objections)." Sec. 102.46(a). Thus, a party may except to findings, rulings and decisions beyond the four corners of the ALJD.

³ For example, where Presbyterian Shadyside takes exception to an evidentiary ruling (made on the record, but not referenced in the ALJD), Presbyterian Shadyside has cited the appropriate page(s) of the record where the ruling appears (*see, e.g.*, Exception Nos. 18-21), and where Presbyterian Shadyside takes exception to a ruling on a petition to revoke (memorialized in a pre-trial order, but not referenced in the ALJD), Presbyterian Shadyside has cited the appropriate order (*see, e.g.*, Exception Nos. 33-34, 38-39).

⁴ For example, where Presbyterian Shadyside takes exception to the ALJ's failure to consider and address certain evidence in the ALJD, Presbyterian Shadyside has cited the evidence that the ALJD ignored. *See, e.g.*, Exception Nos. 30-32.

the extent certain exceptions do not reference the ALJD, it is for these logical reasons. They should not be stricken.

II. Presbyterian Shadyside Has Not Cited the Evidentiary Record to Support Certain Exceptions Challenging the ALJ's Misapplication of Law or Use of Flawed Reasoning.

Similarly, in instances where Presbyterian Shadyside has not cited specific portions of the evidentiary record, it is because those exceptions contend that the ALJ employed faulty reasoning or reached a conclusion contrary to law, disregarded legal precedent, or otherwise misapplied controlling standards. The arguments and legal authority supporting such exceptions are contained in Presbyterian Shadyside's brief (*see, e.g.*, Exception No. 1, argued and supported at Brief pp. 9-10), in conformity with the Board's Rules and Regulations. *See* Sec. 102.46(b)(1) ("If a supporting brief is filed, the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief.") It is readily apparent that a specific record citation would not apply to such an exception. Accordingly, to the extent certain exceptions do not cite the record, it is for these reasons. They should not be stricken.

III. Each of Presbyterian Shadyside's Exceptions Clearly Puts in Issue a Finding or Conclusion of the ALJ, and the General Counsel Has Suffered no Unfair Prejudice.

The General Counsel has cited no Board precedent in support of its Motion to Strike, likely because the instant circumstances are a far cry from the cases in which the Board has stricken noncompliant exceptions that utterly "fail to put in issue any of the findings of the judge." *Worldwide Detective Bureau*, 296 NLRB 148, 148 (1989) (party filed no supporting brief and made no statement whatsoever of the grounds on which the listed findings should be overturned). *Compare also Rocket Industries, Inc.*, 304 NLRB 1017, 1017 (1991) (striking exceptions that "fail[ed] to put in issue any of the findings of the judge"); *Howe K. Sipes Co.*,

319 NLRB 30, 30 (1995) (striking exceptions that “[did] not put in issue any of the judge’s findings”); *Ditch Witch of Central Ill., Inc.*, 248 NLRB 452, 452 (1980) (striking exceptions where party simply resubmitted its post-hearing brief and nowhere set forth “what error, mistake, or oversight . . . the Administrative Law Judge committed.”).

Although the General Counsel laments that it is purportedly unable to “adequately answer” (Motion ¶ 8) Presbyterian Shadyside’s exceptions, this claim of prejudice is implausible. The descriptive text of Presbyterian Shadyside’s well-cited exceptions, coupled with its detailed Brief in Support, make clear exactly which findings and conclusions Presbyterian Shadyside is challenging and why. As there is no unfair prejudice, the General Counsel’s Motion to Strike should be denied. *See In re U.S. Postal Service*, 339 NLRB 400, n.1 (2003) (denying motion to strike exceptions for nonconformity where the General Counsel was not “substantially prejudiced by the Respondent’s failure to comply with these Rules and Regulations”).

The General Counsel’s claim of disadvantage rings particularly hollow here where the General Counsel wholly ignored the requirements of Sections 102.46(b)(1)(iii) and (iv) in presenting its own exceptions. Although the General Counsel now professes that “[t]he required citations to the record . . . are critical” (Motion ¶ 8), *none* of the General Counsel’s exceptions cite the record as required by Section 102.46(b)(1)(iii).⁵ Additionally, *none* of the General Counsel’s exceptions “concisely state[s] the grounds for the exception,” as required by Section 102.46(b)(1)(iv). Instead of complying with these requirements, the General Counsel has generically stated in each exception that it “relies on the record and accompanying Brief.” *See* Counsel for the General Counsel’s Limited Exceptions Nos. 1-8. According to the policy

⁵ Similarly, the Charging Party’s exceptions are totally void of “critical” citations to the record. *See* Charging Party’s Limited Exceptions 1-10.

advanced in the General Counsel's Motion to Strike, demanding strict compliance with Section 102.46(b)(1), *all* of the General Counsel's exceptions are invalid.


Presbyterian Shadyside's exceptions substantially comply with the Board's Rules and Regulations, which is more than can be said for the General Counsel's exceptions. As this is what the Board requires, there is no basis for striking any of Presbyterian Shadyside's exceptions. *See, e.g., Carey Salt Co.*, 360 NLRB No. 38, n.2); *Monarch Machine*, 227 NLRB 1265, n.2; *Gliddings & Lewis, Inc.*, 240 NLRB 441, n.2.

CONCLUSION

For the foregoing reasons, the General Counsel's Motion to Strike should be denied in its entirety.

Respectfully submitted this 20th day of February, 2015.

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CERTIFICATE OF SERVICE


It is certified that a copy of UPMC Presbyterian Shadyside's Opposition to Counsel for The General Counsel's Motion to Strike Certain of Respondent's Exceptions to Administrative Law Judge Mark Carissimi's Decision in the above-captioned case has been served by email on the following persons on this 20th day of February, 2015:

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